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No. 03-701

Supreme Court, U.S.
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In The
Supreme Court of the United States

JAMES S. and REBECCA DEATON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL MINING ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are a roadside ditch and the wetland next to it "navigable waters" under the Clean Water Act?

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INTERESTS OF AMICUS CURIAE

Amicus Curiae, the National Mining Association (NMA), is a trade association representing producers of most of America's coal, metals and industrial and agricultural minerals.[1] The principal purpose of *amicus* is to represent those with interests in the Nation's mineral resources industries in important public policy issues affecting the development and use of mineral resources. NMA members' mining operations are located throughout the country in nearly all the federal appellate jurisdictions and within many of the different divisions and districts designated by the U.S. Army Corps of Engineers (Corps).

Mine sites are characterized by a variety of different geographic and physical features. For example, many mines are located in extremely remote and arid regions. It is not uncommon for drainage features in these areas to rarely flow and, even then, only in response to a substantial storm event. Similarly, many sites cover vast amounts of acreage and are located in the vicinity of irrigation canals, drainage ditches, and similar water management systems. Consequently, NMA members are interested in the establishment of a clear and predictable scope for federal Clean Water Act (CWA) jurisdiction, 33 U.S.C. §§ 1251 *et seq.* (1972) (amended 1977 and 1987). Predictability of regulation is especially important to the mining

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[1] NMA has received the consent of the parties to file this brief as *amicus curiae*. The letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6 of this Court, *amicus* represents that counsel for *amicus* authored this brief in its entirety and that no person or entity other than *amicus* and its representatives made any monetary contribution to the preparation or submission of this brief.

industry given the extraordinary amount of time, money and planning inherent to the development and management of most mining operations.

Mining companies have unique technological, logistical and economic challenges in that mineral resources are fixed in location and limited in quantity.[2] The steps related to the development of the mineral resources involve a substantial upfront commitment of money and time. Assuming minerals exist in commercial quantities, "it can be expected that around 12 years will elapse between the start of [an] exploration [program] and commencement of mine production." Anthony M. Evans, *Introduction to Mineral Exploration* 12 (1995). The amount of time it takes to permit a mine and the amount of investment essential for developing a mine translates to a staggering financial commitment. For example, it is estimated that the engineering, planning and development of modern coal mines must be supported by the investment of hundreds of millions of dollars. *See* William B. Prince, *Joint Development of Coal and Coalbed Methane*, 48 Rocky Mtn. Min. L. Inst. 19-1, 19-7 (2002) (describing these costs). Accordingly, unanticipated delays and the associated unforeseen costs related to inconsistent regulation impair the economic viability of a new or ongoing operation. *See* Ian C. Runge, *Mining Economics and Strategy* 29 (1998) (describing economic uncertainty in mine development).

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[2] The scarcity of hard rock minerals is well documented. "Known ores constitute less than 0.01% of the metal content of the upper 1 km of continental crust. Thus mines can only be located in those few places where economically viable deposits have been formed and discovered . . . " National Research Council, *Hardrock Mining On Federal Lands* 23 (1999).

To the dismay of NMA members and since this Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159 (2001), the U.S. Circuit Courts of Appeal have confounded rather than clarified the analysis for determining what portions of a mine site are potentially regulated as "navigable waters" subject to CWA jurisdiction. As a result of disjunctive appellate court jurisdictional analyses, the regulated community, including NMA members, cannot determine with certainty at what point a nonnavigable water falls within the ambit of the CWA. Indeed, if NMA members evaluate jurisdiction based on the current "guidance" from the courts, they are forced to assess the same sorts of features at different properties in different ways based upon the view of the specific circuit in which the site is located. Federal regulation should not, as a matter of public policy, be predicated upon a balkanized system of circuit-specific tests. The uncertainty and attendant confusion over the scope of federal regulation warrant review by this Court.

OVERVIEW OF PERMITTING OBLIGATIONS AT MINING OPERATIONS

Every mining enterprise is subject to myriad federal and state regulatory regimes starting from when the project is merely a glint in the prospector's eye to the final phases of mine closure and site reclamation. Detailed, rigorous mine planning obligations, intended to prevent or minimize mining-related environmental impacts, are incorporated in federal and state laws including the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 *et seq.* (1976) (amended in 1988), and the

Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201 *et seq.* (1977).

The overarching environmental requirements of the land management statutes and mining-related statutes are supplemented by the numerous federal, state and local media-specific environmental programs established, for example, under the Clean Air Act, the Resource Conservation and Recovery Act, and the CWA. As a consequence, in addition to the environmental stewardship obligations under FLPMA or the detailed planning and reclamation provisions of SMCRA, mine operators must – consistent with the CWA – obtain a permit for a discharge of a pollutant from a point source to navigable waters, i.e., those subject to CWA jurisdiction. *See* Petition at 3-5 (discussing the statutory and regulatory framework related to CWA permitting obligations). Consistently, permits must be obtained for discharges of fill material into jurisdictional waters associated with the construction of support facilities, access roads, pipelines and a host of other commonplace mine-related activities.

The Corps may (and frequently does) take more than a year to process and issue a CWA permit covering discharges of fill material to jurisdictional waters. *See National Assoc. of Home Builders v. U.S. Army Corps of Eng'rs*, ___ F. Supp.2d ___, 2003 WL 23112466, *2 (D.D.C. November 24, 2003) (recognizing the delay inherent in the Corps' permitting process); William L. Want, *Law of Wetlands Regulation* 6, 8-9 (2003) (same). Mine operators must, as a practical matter, conduct a site delineation and assess CWA jurisdiction well in advance of any projects that could potentially require a permit. Front-end jurisdictional waters planning is even more essential given that Corps-approved delineations cannot be challenged in court

until after a permit applicant is denied a permit or declines to accept a proffered permit. *See* 33 C.F.R. § 331.12 (2000) (establishing that a person may not file for judicial review based on a permit denial or failure to accept a proffered permit without exhausting administrative remedies). *See also Rueth v. U.S. Environmental Protection Agency*, 13 F.3d 227, 230 (7th Cir. 1993) (indicating that wetland jurisdiction questions are not ripe for review); *Southern Pines Assoc. v. U.S.*, 912 F.2d 713, 713-714 (4th Cir. 1990) (judicial review precluded until enforcement action initiated). *See generally* Final Rule Establishing an Administrative Appeal Process for the Regulatory Program of the Corps of Engineers, 65 Fed. Reg. 16486, 16488 (March 28, 2000) (clarifying lack of pre-enforcement review). As a result, prudent mine planning and the realities of the Corps' permit program dictate that the nature and extent of CWA permitting obligations be determined early in the mine planning process. If the scope of a mine operator's permit obligations is in flux, years of planning can be compromised, resulting in delays that can impair a mine's viability.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant The Writ Of Certiorari To Resolve The Irreconcilable Conflict Between Decisions In The Fourth, Sixth And Ninth Circuits And Decisions In The Fifth Circuit

This case presents an important question whether the mere potential for a connection or "nexus" with traditionally navigable water can extend the reach of the CWA to ditches, culverts, or other nonnavigable features. The Fifth

Circuit says no absent a "close, direct and proximate link." *Rice v. Harken Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001). In contrast, the Fourth Circuit answers yes as long as there may be "some connection." *U.S. v. Deaton*, 332 F.3d 698, 709 (4th Cir. 2003) *petition for cert. filed* (U.S. November 10, 2003) (No. 03-701). The differences between the circuits cannot be reconciled.

While this Court has recognized that there are "inherent difficulties" in defining "precise bounds to regulable waters," it has also acknowledged that those bounds are not limitless. *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985) (the Corps has jurisdiction over wetlands "inseparably bound up" with navigable waters).[3] The language of the statute establishes a basis for considering those bounds. *See SWANCC*, 531 U.S. at 167 (recognizing that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA"). In that regard, this Court has instructed that to establish jurisdiction over "waters," there must be a "significant nexus" with a traditionally navigable water. *Id.*

In the case at issue, the Fourth Circuit eviscerates *SWANCC*'s core principle requiring a "significant nexus" to navigable waters by extending the reach of CWA to "any branch of a tributary system that *eventually* flows into a navigable body of water." *Deaton*, 332 F.3d at 711 (emphasis

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[3] The language in the statute specifies that the CWA applies to "navigable waters" further defined to mean "waters of the U.S. including the territorial seas." 33 U.S.C. § 1362(7) (1972) (amended 1977 and 1987). *See generally* Petition at 3-5 for a description of the statutory and regulatory language defining "navigable waters."

added). When this Court in *Riverside Bayview* found in the CWA intent to "regulate at least *some* waters that would not be deemed 'navigable,'" 474 U.S. at 133 (emphasis added), it did not mean, as the Fourth Circuit suggests, *all* non-navigable waters with "some connection" (i.e., anything that "eventually provides 'additional matter'") to navigable waters, *Deaton*, 332 F.3d at 709-710. Under the Fourth Circuit's reading of the law, the *SWANCC*-described nexus for finding jurisdiction is rendered meaningless.

Other circuits have similarly run afoul of *SWANCC*. The Sixth Circuit finds that a hydrologic connection from a wetland to a manmade drain to a traditionally navigable water is sufficient to assert CWA jurisdiction because the flows "could affect" a navigable water. *U.S. v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003) *petition for cert. filed* (U.S. December 22, 2003) (No. 03-929). Similarly, in the Ninth Circuit, irrigation canals that retain water via a system of gates are jurisdictional because the gates could fail and allow flows to reach a navigable water. *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 534 (9th Cir. 2001). That attenuated connection is far less than the "significant nexus" required by *SWANCC*.

In stark contrast, the Fifth Circuit finds these formulations of CWA jurisdiction "unsustainable under SWANCC." *U.S. v. James Hamilton Needham, et al.*, ___ F.3d ___, 2003 WL 22953383, *3 (5th Cir. December 16, 2003). Heeding this Court's warning not to read the word "navigable" out of the CWA, the Fifth Circuit has held that under *SWANCC*, "a body of water is subject to regulation . . . if the body of water is actually navigable or is adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269. It follows then that "puddles, sewers, roadside ditches and

the like" are not conduits for extending the scope of CWA jurisdiction. *Needham*, WL 22953383 at *3.

The product of the current jurisdictional split in the circuits is widespread uncertainty regarding the applicability of the CWA to nonnavigable waters. This uncertainty has direct and enormous consequences for mine planning and development. Mine operators must design their facilities around the location of the ore body while accounting for geographical limitations at the site. Accordingly, mine-related activities will occur in and around irrigation, drainage or similar ditches and water features. The post-*SWANCC* confusion creates different federal CWA permitting obligations in different parts of the country.

A mine operator in West Virginia, Kentucky or Nevada who applies *Deaton* or its Sixth and Ninth Circuit corollaries evaluates whether the discharge could eventually reach a jurisdictional water. Accordingly and in the absence of any limiting principles, the operator may be forced to undertake the lengthy and costly CWA permit process to cover potential discharges related to access road construction in the vicinity of a ditch or drainage (no matter how remote) because those discharges *could affect* traditionally navigable waters. These types of decisions can be speculative, produce absurd results, and trigger federal CWA permits for nearly every project at a site. On the other hand, an operator, evaluating permitting issues for a similar project in the vicinity of comparable features in Texas, could reasonably conclude that the link between the road construction and any traditionally navigable water is too far removed to trigger jurisdiction and would not pursue a permit from the Corps.

The appellate court disagreement regarding CWA jurisdiction is, therefore, problematic in that it produces wildly different, irreconcilable results. Members of the regulated community are unable to evaluate, with reasonable certainty, the scope of federal regulation at existing or future projects. In short, this real and present circuit conflict warrants this Court's review.

II. The Post-*SWANCC* Confusion Compromises The Integrity Of The Regulatory Process

The circuit conflict is symptomatic of the confusion that pervades the Corps' administration of the Section 404 program. Just as the circuits have reached markedly different conclusions about the post-*SWANCC* reach of the CWA, the Corps likewise struggles with supplying a coherent set of principles by which regulated parties can reasonably ascertain what is expected of them. The prospect for deriving such guidance through the administrative process fashioned by the Corps is remote. The process is ill-suited for producing what elementary fairness compels – clarity and consistency.

The Corps is a highly decentralized organization so "[m]ost of the authority for administering the program has been delegated to the thirty six district engineers and eleven division engineers."[4] 33 C.F.R. § 320.1(a)(2) (2000). Most CWA jurisdictional decisions occur in the field as a result of case-by-case determinations for permit applications,

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[4] There are now more than thirty six districts established by the Corps. *See* U.S. Army Corps of Engineers, Regulatory Program Website <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/district1.htm>.

33 C.F.R. § 325.1 (1990), or separate jurisdictional determinations, 33 C.F.R. § 325.9 (1990). These determinations by the district engineers may be appealed administratively to the appropriate division engineer (and the designated review officer), 33 C.F.R. § 331.7(a) (2000), but the administrative decisions carry no "precedential value" even within the same Corps district. 33 C.F.R. § 331.7(g).

The results of this administrative process vary widely among and within the districts. For example, the Sacramento District generally declines to regulate drainage and irrigation ditches constructed in uplands while the Omaha District has concluded that any road ditches that capture and convey waters are, without limitation, jurisdictional. *Compare* Leavell/Grey Property, File No. 1997-00375 (U.S. Army Corps of Engineers, Sacramento District 2002) (appeal decision) *with* Frank Krejci, File No. 2000-11140 (U.S. Army Corps of Engineers, Omaha District 2001) (appeal decision). Within the same district, indeed on the same property, the Corps will reach different results about CWA jurisdiction. *See, e.g.*, Marek Property, File No. 2001-75341 (U.S. Army Corps of Engineers, Sacramento District 2003) (appeal decision) (questioning the agency's inconsistent jurisdictional determinations on roadside channels located on property). We respectfully cross-reference the Petition for Writ of Certiorari in *Newdunn Associates LLP v. U.S. Army Corps of Eng'rs*, No. 03-637 at 20-22 (Oct. 30, 2003), for its examples of inconsistent agency decision making on CWA jurisdiction.

The inconsistency in the results of the administrative review process erodes confidence in the process. But even worse, the hardship of the process itself can be so substantial that it often deters the pursuit. Presently, landowners faced with the uncertain prospects about the applicability

of the Section 404 to their activities have several choices: (1) proceed without Corps' permission; (2) immediately acquiesce and apply for a permit; or (3) seek a determination from the Corps regarding the scope of CWA jurisdiction.

The first choice carries grave risk of civil and criminal sanctions if the district engineer decides the landowner chose poorly. The second choice embodies substantial burdens in terms of time and expense. One study found the mean cost of preparing an individual permit application to exceed $270,000, excluding the expenses related to satisfying permit stipulations such as mitigation and design changes to the proposed project. David L. Sunding & David Zilberman, *Non-Federal and Non-Regulatory Approaches to Wetlands Conservation: A Post SWANCC Exploration of Conservation Alternatives* at 7 (Jan. 2003) (available at <http://www.housingandenvironment.org/Text%20Files/Wetlands_Final.PDF>). On average, these individual permits required a total of 788 days to prepare and obtain a decision, with 405 of those days involving the Corps' deliberations. *Id.* at 8.

Finally, a project proponent can request that the Corps issue a jurisdictional determination as to whether an area is subject to regulatory jurisdiction under Section 404. *See* 33 C.F.R. § 325.9 (1990) (describing authority of Corps to issue such determinations). However, this determination cannot "include determinations that a particular activity requires a . . . permit." 33 C.F.R. § 331.2 (2000) (definition of *jurisdictional determination*). And, this is not the only caveat or limitation. The determination remains in effect for only five years, hardly providing sufficient repose on a threshold question that could sink many an enterprise. *See* U.S. Army Corps of Engineers, Regulatory

Guidance Letter 94-01, *Expiration Dates for Wetlands Jurisdictional Delineations* (May 23, 1994). But, without question, the most unsatisfactory aspect of this path is the absence of any recourse to a neutral arbiter if the landowner disagrees that the area is subject to Section 404. While a jurisdictional determination can be administratively appealed, it cannot be appealed to court. Instead, if the project proponent is dissatisfied with the scope of jurisdiction defined by the administrative process, the process cruelly redirects one to the second choice – seek a permit, decline it, and then exhaust "all applicable administrative remedies" before seeking judicial review. 33 C.F.R. § 331.12 (2000).

The pervasive uncertainty on the threshold question of regulatory jurisdiction denies the regulated community any real choices since under the present circumstances none of these choices can be truly informed ones. The present uncertainty combined with the undue process (and its hardship) prescribed by the agency makes reliance more uncertain, investments less justified, and the program less credible. The Court should take this case to provide clarity and restore integrity to the process.

III. The Court's Guidance Is Necessary Because The Executive Branch Has Abdicated Its Prerogative To Provide National Policy On CWA Jurisdiction

Ordinarily, one would expect the Executive Branch to exercise its prerogative and provide the public the certainty it deserves with respect to the scope of CWA regulation. The Executive Branch has, however, recently announced that it is declining to provide guidance and policy on this important national question. As a consequence, without this Court's intercession in this case, the

plans and investments of NMA's members remain intolerably at risk to the whims of the numerous district engineers attempting to draw jurisdictional lines without principled guidance.

By most accounts, *SWANCC* was a significant ruling addressing the scope of the CWA. *See, e.g.*, Sheila Deely and Mark Latham, *The Federal Wetlands Program: A Regulatory Program Run Amuck*, 34 Envtl. L. Rep. (Envtl. L. Inst.) 966, 966-967 (April 25, 2003) (characterizing *SWANCC* as "dramatically altering" the jurisdictional framework); Pat Parenteau, Position Paper on CWA Jurisdiction Pursuant to SWANCC presented to Administrator Whitman United States Environmental Protection Agency by the Association of State Wetland Managers and the Association of State Floodplain Managers (December 2001) (referencing turmoil since *SWANCC*) (transcript available at <http://www.aswm.org/fwp/swancc/position.pdf>); William Funk, *The Court, the Clean Water Act and the Constitution: SWANCC and Beyond*, 31 Envtl. L. Rep. 10741 (Envtl. L. Inst.) (July 2001) (referencing potentially staggering impacts for environmental law related to *SWANCC*). This is precisely how the agencies' chief legal officers characterized the decision days after its issuance. *See* Memorandum from Gary S. Guzy, General Counsel, U.S. Environmental Protection Agency and Robert M. Andersen, Chief Counsel, U.S. Army Corps of Engineers, on Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters, (January 19, 2001) (available at <http://www.spk.usace.army.mil/pub/outgoing/co/reg/SWANCC.pdf>). Notwithstanding this characterization, the agencies' lawyers concluded "that most CWA jurisdiction remains basically intact," *id.* at 5, and advised that the agencies continue to assert jurisdiction "upstream to the highest

reach of the tributary system, and over all wetlands adjacent to any and all of those waters." *Id.* at 6. *Compare with SWANCC*, 531 U.S. at 176-77, 189-90 n.14 (recognizing majority opinion as drawing a jurisdictional line that invalidates not only the migratory bird rule but jurisdiction over "intermittent rivers, streams, tributaries and perched wetlands that are not contiguous or adjacent to navigable waters") (Stevens, J. *dissenting*).

Whether due to confusion related to the post-*SWANCC* jurisprudence or to discomfort with the agencies' miserly view of the "significance" of this Court's ruling, the Corps and EPA proceeded to take a second look at *SWANCC*'s effect on the CWA state of regulatory affairs in different ways. First, the chief legal officers have raised questions about the basis for asserting jurisdiction over certain nonnavigable waters. *See* Memorandum from Robert F. Fabricant, General Counsel, U.S. Environmental Protection Agency and Steven J. Morello, General Counsel, U.S. Army Corps of Engineers, *Guidance For Asserting Federal Jurisdiction Over Isolated Wetlands In Response to U.S. Supreme Court Decision in SWANCC Case*, 68 Fed. Reg. 1991, 1996 (January 15, 2003) (2003 Guidance). Second, the agencies also initiated a rulemaking in order to "help . . . the public understand[] what waters are subject to CWA jurisdiction." Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1993 (January 15, 2003). Quite apart from the fact that it has been "some time" since the agencies engaged the public in a discourse on this question, *id.*, the agencies specifically recognized that the public interest would be served by a rulemaking "to ensure that [the regulations] are consistent with the *SWANCC* decision." *Id.*

Unfortunately, the Executive Branch has now informed the regulated community that it is not up to the task. The agencies have decided they will not promulgate a rule to clarify jurisdiction under the CWA. *See* E.P.A. and U.S. Army Corps of Engineers Press Release (December 16, 2003) (transcript available at <http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/540f28acf38d7f9b85256dfe00714ab0?OpenDocument>). Instead, NMA's members and others with real property interests, are cast adrift with instructions to navigate the protracted and perilous case-by-case administrative process. The sole compass is the 2003 Guidance that raises – but does not answer – the lingering questions about the basis for asserting jurisdiction over waters other than those that are navigable, their primary tributaries and wetlands adjacent to those waters. *See generally* 2003 Guidance (cataloging post-*SWANCC* jurisprudence on these matters).

NMA's members are left with an unsatisfactory choice; they can incur substantial expense and delay to obtain a permit that may be unnecessary, or proceed at grave risk of enforcement sanctions if a district engineer deems the choice unwise. The status quo may be perfectly acceptable to those charged with administering the regulatory program. But for those who must endure the hardship of the process itself, further guidance from this Court is now essential.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: January 30, 2004.

Respectfully submitted,

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